Bending Towards Justice

A Path for Reviving Panel Hearings Under the Human Affairs Law

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A. An Introduction to the Human Affairs Commission and Panel Hearings

"The arc of the moral universe is long, but it bends toward justice."

Rev. Dr. Martin Luther King, Jr.

It was this "bending toward justice" that gave rise to the formation of the South Carolina Human Affairs Commission. In reaction to the chaotic political and social events which spanned the course of the American Civil Rights movement, the South Carolina state legislature (under Governor John C. West), enacted the Human Affairs Law in 1972. That law empowered the Human Affairs Commission ("Commission") to prevent and eliminate discrimination because of race, religion, color, national origin, age and sex.[1]

Originally, the Commission's enforcement authority largely concerned the filing of employment discrimination claims which were brought *against state agencies exclusively*. Over time, however, the reach of the Commission's authority was broadened to include allegations *against any employer* who would ordinarily be jurisdictional[2] under equivalent federal law.[3]

As a result of the gradual broadening to its authority, the Commission's enforcement powers took on *two distinct paths*- one for complaints directed at a sister state agency and one for allegations of discrimination against another jurisdictional employer (for example, municipal entities, staffing companies, or private employers). Should allegations of discrimination be directed at a 'non-state agency' employer, then the Commission is tasked with investigating the allegations, determining whether any of the allegations are 'more likely

[1] See S.C. Code Ann. §1-13-20, which has been amended to include disability as well.
[2] Generally defined as any employment agency, any labor organization, or a private or public employer having 15 or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year. See S.C. Code Ann. §1-13-30.
[3] These laws include Title VII of the Civil Rights Act of 1964, as amended, the Americans with Disabilities Act of 1990, as amended, and the Age Discrimination in Employment Act of 1967, as amended.

than not to be' true[4], and if any are, the Commission may file a lawsuit[5] against the employer or staffing agency premised on the investigation's findings of unlawful discrimination[6] When the Commission takes in a claim of workplace discrimination against a state agency, however, key differences exist. First, a member of the Commission's Board is assigned to the case, and the Board Member must ultimately concur with the investigator's findings prior to finalizing a determination on the merit of the allegations. Second, any determination regarding a state agency results in either a dismissal of the complaint (without right to judicial review) or a hearing of the complaint before a panel of three other Commission Board Members.

Such state agency hearings must be properly noticed, a complaint must be served, and, just as it does during the course of the investigation, the Commission has the authority to engage in discovery with the parties for clarification of the facts. The Board Chairman selects three board members to serve as the panel for the purposes of the hearing, and the panel may not include the board member assigned to assist with the investigation. The issues in the hearing may be expanded or reduced at the panel's discretion.

A hearing would entail the presentation of evidence by either side of the discrimination claim[7], and the panel of Board Members would thereafter issue an order finding in favor of either the alleged victim of discrimination, or the state agency. An order against a state agency would properly include damages for the victim and injunctive relief for both the victim and for the public interest.

[4] Alternatively known as a 'preponderance of the evidence' standard, or a 'for cause' standard.
[5] If filed within the statute of limitations found at S.C. Code Ann. §1-13-90(d)(6).
[6] Should the Commission determine that insufficient evidence exists regarding the claim of discrimination, a Notice is issued advising the complainant of their right to file suit in circuit court privately.
[7] The Commission, itself, will present evidence in support of the complaint through one or more of its employees or agents, and the aggrieved party may also have private representation appear.

The Administrative Procedures Act should be followed regarding the hearing, order, and any appeal from the order.

B. Problem Statement

"*We've come a long way from the days where there was state-enforced segregation. But we still have a way to go*."

--Justice Ruth Bader Ginsburg

The establishment of the Commission was a much needed and positive step in dealing with discrimination, but its work still has a long way to go. For many years, the Commission has been unable to hold hearings pursuant to the Human Affairs Law (HAL).[8] While numerous factors have contributed to this short-coming, it appears that it most likely-initially resulted from a lack of ripe cases, which led to inconsistent approaches to holding hearings, and ultimately, an absence of any process at all.

Aside from anecdotal evidence provided by long-serving Commission employees, few resources exist as to when, how, and why the last hearing under the Human Affairs Law was held. Files physically housed at the Commission get purged within ten years. The South Carolina State Library, however, maintains copies of the yearly Annual Reports that the Commission formerly provided the state General Assembly[9]. In at least one of the Commission's Annual Reports to the Legislature, it appears that a matter was 'pending hearing' during the close of state fiscal year 1980. In the subsequent fiscal year's Annual Report, the matter appears to have been heard by a panel and an "Order issued," though no

[8] The Human Affairs Commission similarly may adjudicate allegations of housing discrimination, pursuant to the South Carolina Fair Housing Law (FHL). In 2017, the first ever hearing was held in accordance with this law's authority – more than 20 years after the passage of the Law that created the process. Two more Fair Housing hearings have been held since, and around ten matters were scheduled for a hearing, but settled prior to the date noticed for the proceedings.

[9] The Accountability Report took the place of the Annual Report.

records could be located related to the Order's findings. The Annual Report for fiscal year 1982 reflects that four matters were "pending hearing" at its close. This Report also summarizes two of the hearings' findings. Again, however, the Orders themselves could not be found. Of note, during the early 1980s, the Commission had three attorneys on staff. After 1982, the Commission experienced high turnover in the legal department, and the number of attorneys dwindled from three to two the following year. By 1988, the Commission employed only one attorney.

Recently, however, the Commission has seen a relative uptick in employment cases that would warrant a hearing at the Commission and yet, the Commission has still not been able to fulfill its mandate in the manner it should by proceeding to a hearing. The reasons for this are manifold. First, investigators lack proper training for presenting their findings before a panel. Similarly, the Board of Commissioners, until recently, lacked sufficient training for holding a hearing. Moreover, the Commission employed only one or two attorneys at the agency until approximately October 2016, making the prospect for holding a proper hearing nearly impossible since so many statutes and court rules should be followed by the panel and the advocates in the case. Finally, costs, too, are an issue.

In lieu of hearings, a shortcut for HAL cases (involving employment discrimination) has been developed by the Commission[10], which generally protects potential victims of discrimination from lacking recourse. Still, the law as written should be followed to ensure that likely victims of discrimination have a right to a hearing within the SC state system as part of their due process under the Human Affairs Law.

[10] Specifically, that an HAL case otherwise ripe for a hearing will be waived to the EEOC (the Commission's federal counterpart) for continued processing and an assessment by federal entities for possible trial.

Fortunately, while no HAL hearings (involving employment discrimination) have been held since approximately 1982 (as mentioned earlier), in recent years, a hearing process *has been* implemented for purposes of properly adjudicating *housing discrimination matters* pursuant to the South Carolina Fair Housing Law (FHL). Through a strong partnership with its federal counterpart the United States Department of Housing and Urban Development (HUD), the Commission has developed resources and strategies for accomplishing its purpose in this area of its responsibility. To this end, the Board of Commissioners has adeptly shifted their role by adopting the arduous expectations of "board panel member". All seven members of the board have served on at least one panel and have received training on their duties, as well as the fundamentals of the laws they are to uphold through the hearing process.

Investigators in the Commission's Fair Housing department have access to training tools on presenting evidence during the required evidentiary hearing. HUD pays for and provides training to investigators every year so that the myriad skills involved with successfully completing investigative duties are accomplished. These skills include testifying in court, which requires the non-lawyer investigator to competently explain the legal nuances of discrimination to less-expert individuals, such as Commissioners or parties.

HUD further assists the Commission by providing fixed sums for the purposes of litigation expenses. Though these sums rarely offer the agency total reimbursement, the payments certainly help offset the Commission's initial outlay.[11]

As will be discussed more in detail below, aligning employment investigations with housing investigations should provide solid ground for adjudicating cases by hearing under the Human Affairs Law.

[11] Thankfully, the law itself also provides for civil penalties, paid to the agency, which may further reimburse expenses the agency experiences if the final order or verdict is favorable.

C. Comparison of Data

"Yesterday is not ours to recover, but tomorrow is ours to win or lose."

--Lyndon B. Johnson

The challenge before the Commission now is how to move forward in fulfilling its mandate in the area of HAL as it has recently done in the area of FHL. Comparing hearings under the Commission's respective laws provides the most direct form of scrutiny, especially considering one type of hearing (housing) has been implemented while the other (employment) remains defunct. Yet, within that comparison, certain distinctions should be identified and addressed.

1. Analysis of Commission Investigators

The Human Affairs Law's process faces more obstacles than does the Fair Housing Law process. Training for investigators on the employment side of the Commission has become more robust and consistent in recent years, but previously, the training appears to have been less frequent and did not address testifying at hearings. Supervisors within the employment investigation department, in conjunction with the legal department, have worked towards more systematic training in the last few years. Part of the new training now includes a brief overview of giving testimony, but this training should be refined based on feedback from investigators who end up testifying in hearing.

Another concern is that (unlike in the arena of fair housing), the employment investigators must attempt to conciliate a matter after a determination is made but before a hearing may be ordered[12]. Presently, the Commission waives any 'for cause' cases to its federal equivalent, the Equal Employment Opportunity Commission, for additional processing. The Commission's investigators, therefore, have not been trained to work on conciliation

[12] S.C. Code Regs 65-5.

efforts ‘post cause’, to include appropriate calculation of damages. This requirement is not found in the Fair Housing context, though most fair housing investigators have received training on conciliation and calculating damages from HUD.

Finally, the lifespan of an employment investigator’s career at the Commission has sharply declined in recent years. In October 2017, the average tenure for an investigator was one year and five months. Contrastingly, the average tenure for a fair housing investigator at that time was approximately six years. In order to encourage institutional knowledge and to prevent wasted resources on training in employment, the Commission must continue to implement novel ways of retaining staff. Thankfully, this is being addressed by management and the average tenure of investigators has begun to increase over the last year.

2. Board Member Education and Burnout

Orientation training for new Commissioners lasts several hours and covers a multitude of topics, including an overview of prohibited acts in the Human Affairs Law. This training is generally completed for any new board member within a few months of their appointment and confirmation. Once trained, board members begin attending quarterly board meetings. At meetings, the board is presented with information regarding the day-to-day operations of the Commission, such as finance reports, staffing changes, and legal updates. Prior to 2016, there was not an emphasis on basic legal concepts in either fair housing or employment discrimination. In implementing housing hearings, though, this changed, and the board began receiving training on concepts such as disability accommodations, retaliation, and familial status violations. The Commissioners would need to be similarly trained on basic employment discrimination concepts in order to make the hearing process a success.

Additionally, Board Members at the Commission regularly surpass their statutory terms for holding their position, because new appointments have been made infrequently in the last two decades. Moreover, currently two of the nine positions on the Board remain vacant. In any employment hearing, a supervisory commissioner must refer an order for hearing to the Chairman, who then assigns the panel of three additional commission members. Therefore, in any matter for hearing, four or five Commissioners are required to be involved. Hearings, like trials, may last days depending on the complexity of the matter. For Board Members who remain in the workforce, these hearings become quite challenging and burdensome to schedule, and sometimes may be pushed months from the date the investigation ended. To help alleviate the burden of scheduling, vacancies should be filled.

3. Monetary Resources and the Legal Department

The Equal Employment Opportunity Commission does not provide additional funding for the purposes of holding a hearing or litigating a matter in circuit court. As such, any litigation undertaken by the legal department must be funded through state appropriations. The daunting expense of a hearing has certainly become an obstacle for proceeding, since the Commission would bear the burden, not only of prosecuting the case on behalf of the victim, but also in administering the procedural aspects of the hearing in the same manner as a court.

This type of structure is not completely unusual within the state. The South Carolina Department of Labor, Licensing, and Regulation, ("LLR") for example, will both prosecute matters against a purported violator while also having the relevant licensing board order relief for or against the accused licensee. Upon review of LLR's processes, the Commission determined that at least three attorneys must be employed for properly managing a hearing[13].

[13] The Agency Head had previously determined a need for three attorneys at the Commission, in light of other agency requirements, but the hearing process further necessitates three attorney positions.

Hearings are to be held as expeditiously and inexpensively as possible. Further, the Commission's best practices include have one attorney prosecute a matter (with the assistance of the investigator) and another attorney to advise and consult with the panel adjudicating the hearing in order to appropriately rule on motions, evidentiary issues, and to draft Orders in line with the panel's rulings. The third attorney serves as a back-up to either position, should one attorney require protracted protected leave or should a vacancy occur in staffing for an extended period[14]. Aside from the existence of a third attorney, other expectations apply to the participation of Commission attorneys from an ethical perspective, which should be well thought out prior to having a hearing take place[15].

D. Implementation Plan

"Where you see wrong or inequality or injustice, speak out, because this is your country. This is your democracy. Make it. Protect it. Pass it on."

--Justice Thurgood Marshall

The South Carolina Human Affairs Commission was created to contribute to a more just and equitable society, to protect and pass on our state's highest ideals. This paper is an attempt to focus on the challenges and possible solutions to help the Commission achieve those objectives. As with the previous section comparing data, the process for implementation should be analyzed by addressing the various stakeholders within the Commission that must commit to advancing "for cause" hearings. Once each group has taken the action steps needed to

[14] Due to regulations and requirements of hiring attorneys for the state through the Attorney General's office, onboarding a new attorney can take up to three months or longer. This delay has and would cause serious efficiency issues for the state, as well as for the Aggrieved Parties whom the Commission serves.

[15] As part of the research for the project, the Commission obtained an Attorney General Opinion dated March 23, 2018, related to, in general, appeals from a Board Order by a Commission attorney. Furthermore, the Commission attorneys sought guidance from the South Carolina Bar Ethics Committee in an effort to avoid any ethical obstacles that may arise as the hearing process develops. See Appendix A and B, respectively.

complete objective for holding hearings, then a standard operating procedure may be implemented.

1. Commission Investigators' Training and Tenure

A full training module should be developed for current and new employment investigators, with assistance from investigators, their supervisors, legal, and the housing division. Clearly, this training curriculum would serve a greater purpose than the singular goal of testifying at hearings, but arguably, systematic training would engender greater confidence within the rank and file members of the department. Once created and implemented, the training should be periodically reviewed and updated.

As lofty as the goal associated with training may seem, increasing average tenure will likely be harder to attain. Exit interviews indicated that employment investigators leave for high pay and less stressful workloads. Significant pay increases would require a substantial budget increase for the Commission. Workload objectives are calculated based on the Commission's contract with the EEOC's each year. Neither pay nor workload is likely to change in the coming years. However, to make the positions more appealing, the Commission recently began to offer adjusted work schedules to high performers, as well as telecommuting privileges. These small changes have improved morale, based on survey results from October 2018[16]. Additionally, fewer investigators left in calendar year 2018 than in 2017. Other improvements are also being developed, such as hiring an administrative employee to alleviate certain processing hurdles that purportedly take up too much time for the investigators themselves. Ultimately, though, if the objective of holding successful hearings is to come to fruition, the Commission must hire and retain competent, confident investigators who can provide testimony at the proceeding.

[16] See Appendix C.

2. Board Member Assistance

Akin to the training modules that should be developed for employment investigators, training for board members should be more comprehensive and systematic. No new board members have been appointment to the Commission since the housing hearing training was given in 2016 and 2017. Yet, any new appointee will need to be apprised of the hearing process in housing and employment alike.

Board Members should also be able to rely on the term limits in the law for understanding the length of their appointments and expected contribution. In order to accomplish this objective, the Commission will need to work with appropriate personnel in state government (outside of the Commission) who are able and willing to assist with appointing new Commissioners. Concerted efforts to appoint, train and retain a full slate of Commissioners should be undertaken immediately.

3. Covering Costs and Applying the Law

Since the Commission does not receive additional federal funding for employment hearings, the Commission will either need to seek additional funding through the state appropriations process, or may want to push for legislation that would allow the Commission to recover costs from offending discriminators, when appropriate. This would mirror the fair housing process, which provides for civil penalty awards to the Commission.

Thankfully, because of housing hearings, the legal department has been able to redistribute duties and objectives so that each respective attorney is ethically managing his or her responsibilities during the hearing process. Many resources helped the department develop a practice for properly engaging in these complicated actions and advising other Commission agents on how to do the same. Still, a manual or formal guidance should be drafted to give the

lawyers, paralegal, investigators, and parties a better understanding of the internal machinations that lead up to and take place during a hearing. The Commission also may need to request additional opinions from the Office of the Attorney General so that continued developments of processes are aligned with his objectives.

E. <u>Evaluation Method</u>

"Character cannot be developed in ease and quiet. Only through experience of trial and suffering can the soul be strengthened, ambition inspired, and success achieved."

--Helen Keller

Any human endeavor to live responsibly in the world requires effort, commitment and resiliency. It is as true for entities such as the Human Affairs Commission as it is for individuals. Together, those who undertake its mission strive for success.

The clearest indicator of success will be reflected by victories of the Commission in prosecuting cases successfully, as well as by the Commission panels' successes in issuing Orders that are not overturned on appeal. In other words, cases should only be taken to a hearing if they will be successfully prosecuted, and a panel should only find in favor of the Commission when the evidence supports a favorable finding. The Commission should also solicit feedback from attorneys who pursue cases the Commission dismisses. Any successfully litigated state or federal court case against a state agency on discrimination claims would potentially be a matter the Commission should have heard before a panel instead. Attorneys at the Commission should also evaluate their individual success based on awards, settlements, disciplinary or malpractice actions, and satisfaction of the client.

Hopefully, the staff's increased effort towards holding hearings will not hinder or setback productivity in other areas, such as meeting the annual EEOC contract of case

production. Also, minimizing turnover should correspond to the success of training and hearings, since the investigators will likely feel more connection to the parties they are investigating. Continuing to solicit feedback through surveys to the investigators will offer additional insight into the usefulness of training modules that are developed.

F. Summary and Recommendations

The Human Affairs Law is well-enforced by the Commission, with only one exception-holding hearings. Management and Board Members have been striving towards restoring the hearing process throughout the Commission for several years, though employment hearings under the Human Affairs Law have not materialized yet. Training for investigators, board members, and attorneys, as well as a procedures manual will equip the Commission for managing hearings. Additionally, changes to the law itself or funding for the Commission would ensure that the hearing process is financially viable. In the interim, it behooves the Commission to maintain its staffing level and as many high-performing staff members as possible so that the Commission retains enough institutional and legal knowledge to work towards a permanent structure of adjudicating cases through panel hearings.

"Achievement is largely the product of steadily raising one's level of aspiration and expectation."

--Jack Nicklaus

Appendix A

ALAN WILSON
ATTORNEY GENERAL

March 23, 2018

R. Alexander Pate, II
South Carolina Human Affairs Commission
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Columbia, SC 29240-4490

Dear Mr. Pate:

We received your request for an opinion regarding procedural questions related to appeals from proceedings before the South Carolina Human Affairs Commission. The following opinion sets out our understanding of your question and our response. We quote from your letter at length in order to reproduce the factual background set out therein.

Issue (as quoted from your letter):

> The South Caroline Human Affairs Commission's mission, as affirmed by the General Assembly, is to eliminate and prevent discrimination in employment, housing, and public accommodations. The Human Affairs Commission works to eliminate housing discrimination and to ensure equal opportunity for all people through leadership, education and outreach, public policy initiatives, investigation of fair housing violations, and enforcement. The commission is composed of members appointed by the Governor. The commission employs three attorneys who serve to advise the Commission, represent the Commission in administrative and judicial hearings, and perform other necessary functions as directed by the board.
>
> Upon receipt of a complaint alleging a violation of the South Carolina Fair Housing Law, S.C. Code Ann. § 31-21-10, *et seq.*, the Commission conducts an investigation into the alleged violation. If a determination is made that a violation has occurred, the Commission must commence an administrative hearing pursuant to S.C. Code Ann. § 31-21-130 (C) and (H), in which a Panel of the Board of Commissioners hears the complaint and evidence is presented on behalf of the aggrieved party by agent of the Commission; this task is performed by one of the staff attorneys. While an aggrieved party may intervene to become a party to the hearing and/or have private counsel, the 'default' procedure is for the Commission to file on the aggrieved party's behalf, resulting in an agency attorney representing the Commission, the public interest, and the aggrieved party.

In the employment context, pursuant to § 1-13-90 (C), the Commission holds hearings when a state agency is the employer and a determination is made that a violation has occurred. Unlike a hearing under the Fair Housing Law, a complaining party may, with consent of the Commission, have private representation at the hearing without intervening, pursuant to § 1-13-90 (C) (12).

At the hearing, one of the Commission's attorneys serves as advice counsel for the panel, aiding them in ruling on evidentiary matters, advising them on the relevant law, and aiding them in the form of their order; the advice counsel does not vote on the decision rendered by the panel.

After an order issued by the panel, the Fair Housing Law provides avenues for administrative review and appellate review. § 31-21-130 (O)(1) states: "[i]f an application for review is made to the commission within fourteen days from the date of the order of the commission, the commission, for good cause shown, shall review the order and evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the order." ; § 31-21-130 (O)(2) states: "Either party to the dispute, within thirty days after receipt of notice to be sent by registered mail of the order, but not after that time, may appeal from the decision of the commission to the Administrative Law Court as provided in Sections 1-23-380(B)[fn. 1] and 1-23-600(D)." [Fn. 1 to the letter reads "1-23-380(B) was deleted by amendment in 2008; however, the section still appears to provide relevant direction for the appellate process."]

The Human Affairs Law, at § 1-13-90 (C) (19), also provides for the submission of an application for review; further, (19) (ii) states that "[e]ither party to the dispute" may pursue an appeal.

Administrative hearings held under both the Fair Housing Law and the Human Affairs Law are subject to the Administrative Procedures Act, § 1-23-10, *et seq.*

§ 1-23-380 states that "[a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review."

Question 1:

If an aggrieved party (that is, someone on whose behalf a complaint is brought) requests an application for review or an appeal, may the agency attorney do so?

Question 2:

(A) If the Agency Attorney or the Commission decides not to submit an application for review or pursue an appeal, may an aggrieved/complaining party pursue either of those remedies themselves, keeping in mind that, absent an intervention, they are not a named party in the matter?

(B) In a hearing under the Human Affairs Law, if the complaining party has private representation at the hearing, does that affect their ability to request a review?

Question 3:

May the Commission ever be a party "aggrieved by a final decision" when that decision is rendered by a panel of the Commission?

Question 4:

(A) Where the language of § 31-21-130(C) and (H) is imperative regarding the agency's duty to bring and prosecute a claim on behalf of an aggrieved party, (O) uses permissive language in regards to the pursuit of an appeal. Is the agency under any obligation to pursue an appeal where it appears one of the factors outlined in § 1-23-380 are implicated?

(B) Where the language of § 1-13-90 (C) (5) and (12) is imperative regarding the agency's duty to bring and prosecute a claim on behalf of a complaining party, (19) uses permissive language in regards to the pursuit of an appeal. Is the agency under any obligation to pursue an appeal where it appears one of the factors outlined in § 1-23-380 are implicated?

Law/Analysis:

1. If an aggrieved party (that is, someone on whose behalf a complaint is brought), requests an application for review or an appeal, may the agency attorney do so?

We believe that a court most likely would hold that where an agency attorney is representing the Commission as a party and the interests of an aggrieved party in a proceeding before an agency panel, that attorney may request an application for review or appeal from a decision of that panel for any number of reasons, which may include the request of an aggrieved party. *See Dorman v. Dep't of Health & Envtl. Control*, 350 S.C. 159, 565 S.E.2d 119 (Ct. App. 2002). As described in your letter, proceedings before the Commission are governed by Section 1-13-90 in the employment context and Section 31-21-130 in the housing context. S.C. Code Ann. §§ 1-13-90(c)(15) (2005); 31-21-130(K) (2007). Both statutes direct that "proceedings . . . shall be subject to the Administrative Procedures Act." *Id.* A court faced with the question

presented in your letter most likely would use South Carolina's rules of statutory construction to construe these statutes and give effect to the intent of the Legislature which passed them. As this Office has previously opined:

> The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S., E.2d 203 (Ct. App. 2002) (citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory interpretation are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999).

Op. S.C. Att'y Gen., 2005 WL 1983358 (July 14, 2005). The South Carolina Supreme Court also has held that:

> However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning, when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature, or would defeat the plain legislative intention; and if possible will construe the statute so as to escape the absurdity and carry the intention into effect.

State ex rel. McLeod v. Montgomery, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964) (quoting *Stackhouse v. County Board*, 86 S.C. 419, 68 S.E. 561 (1910)). Finally, we note that where a state agency is tasked with enforcing a state law, that agency's interpretation of the law receives substantial deference. *See Logan v. Leatherman*, 290 S.C. 400, 403, 351 S.E.2d 146, 148 (1986). As our Office has previously opined:

> [O]ur Court of Appeals has stated, "agencies charged with enforcing statutes . . . receive deference from the courts as to their interpretations of those laws." *State v. Sweat*, 379 S.C. 367, 385, 665 S.E.2d 645, 655 (Ct. App. 2008). Our Supreme Court has recognized this fundamental principle of deference to an administrative agency interpretation in *Logan v. Leatherman*, 290 S.C. 400, 403, 351 S.E.2d 146, 148 (1986), when it concluded that "construction of a statute by the agency charged with executing it is entitled to the most respectful consideration [by the courts] and should not be overruled absent cogent reasons." Particularly will the courts defer to the agency's interpretation of a statute where, as here, "the agency's construction lies within its area of expertise." *Op. S.C. Atty. Gen.*, January 5, 2011 (2011 WL 380157). . . . For all these reasons, therefore, "[i]t is this Office's longstanding policy . . . to defer to the [interpretation of] the administrative agency charged with the regulation [of] . . . the subject matter." *Op. S.C. Atty. Gen.*, August 9, 2013 (2013WL 4497164).

Op. S.C. Att'y Gen., 2013 WL 4873939 (September 5, 2013).

Turning to the text of Section 1-13-90 and Section 31-21-130, neither code section expressly precludes an agency attorney appealing from a decision of a Commission panel which is adverse to the aggrieved party. *See* S.C. Code Ann. § 1-13-90 & 31-21-130. Conversely, Section 1-23-310 expressly contemplates that a state agency may be a party to a proceeding when it defines "party" for purposes of the Administrative Procedures Act ("APA") as "each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party." S.C. Code Ann. § 1-23-310(5) (2005); *see also Babcock Center, Inc. v. Office of Audits*, 286 S.C. 398, 334 S.E.2d 112 (1985) (holding that under the APA, personnel employed by a state agency may prosecute an administrative proceeding before a panel of other persons, also employed by the same agency, who adjudicate the proceeding). Both Sections 1-13-90 and Section 31-21-130 include an express provision that "[e]ither party to the dispute . . . may appeal from the decision of the commission to the Administrative Law Court as provided in Sections 1-23-380(B) and 1-23-600(D)." Also, the appellate courts of this state have affirmed the propriety of an administrative agency participating as a party to an appeal from a proceeding before that same agency. *See Dorman v. Dep't of Health & Envtl. Control*, 350 S.C. 159, 565 S.E.2d 119 (Ct. App. 2002).

We understand from your letter that an agency attorney represents the Commission as a party in a given proceeding before the Commission panel. *See question presented, supra.* These proceedings are undertaken at the request of complainants, and the Commission is tasked with protecting the rights of aggrieved parties. *See, e.g.,* S.C. Code Ann. § 1-13-90 (Supp. 2017). Therefore it logically follows that an agency attorney could represent the Commission as a party in an appeal from such a proceeding, and that appeal might be pursued for any number of reasons, including the request of the aggrieved party. *See* S.C. Code Ann. § 1-23-310(5) (2014).

2. (A) If the Agency Attorney or the Commission decides not to submit an application for review or pursue an appeal, may an aggrieved/complaining party pursue either of these remedies themselves, keeping in mind that, absent an intervention, they are not a named party in the matter?

(B) In a hearing under the Human Affairs Law, if the complaining party has private representation at the hearing, does that affect their ability to request a review?

Where a complainant or aggrieved party is not a named party[1] to an action but wishes to pursue review of a decision or an appeal of a decision which the Commission attorney does not intend to pursue, we believe that a court most likely would conclude that the appropriate course of action is for that complainant or aggrieved party to timely seek to intervene in the action to become a party and then pursue the appeal under the procedure set out in the APA. *See* S.C. Code Ann. § 1-23-310(5) (2005) (defining "party"); *see also* SCALC Rule 20. We emphasize that an aggrieved party with standing to intervene as a named party in an administrative proceeding can lose any opportunity to seek judicial review of the result if the aggrieved party fails to timely intervene. *See* SCALC Rule 20(C) ("Time for Motion for Intervention"); *see also Home Health Services, Inc. v. S.C. Dep't of Health & Envtl. Control*, 298 S.C. 258, 379 S.E.2d 734 (1989). Moreover, because to the general nature of the question this opinion should not be read as a statement on when or whether any particular motion to intervene is timely. *See id.*

You note in your question that aggrieved parties typically are not named parties in Commission proceedings "absent an intervention." *See question presented, supra.* For purposes of the Administrative Procedures Act, Section 1-23-310 defines a "party" as "each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party." S.C. Code Ann. § 1-23-310(5) (2005). "Party" is defined by the SCALC in Rule 2 with language that mirrors that of Section 1-23-310: "each person or agency named or admitted as a party or properly seeking and entitled to be admitted as a party, including a license or permit applicant." SCALC Rule 2. We also note that Rule 8 of those same Rules governs the "Right of Parties to Participate," and that particular rule and several other rules frame numerous procedural rights in relation to a "party." SCALC Rule 8.

Aggrieved parties may seek to intervene as named parties to the proceeding under both the regulations promulgated by the Commission and Rule 20 of the Rules of Procedure for the Administrative Law Court. SCALC Rule 20; *see also* S.C. Code Ann. Regs. 65-233(H). Rule 20 reads:

> A. Motions for Intervention. A motion for leave to intervene shall be served on all parties and shall state the grounds for the proposed intervention, the position

[1] We understand that your question is focused on this particular scenario, and not on the procedural rights of a named party which has rights to review of an administrative decision under, e.g., S.C. Code Ann. § 1-23-380 and S.C. Const. art. I, § 22.

> and interest of the proposed intervenor, and the possible impact of the intervention on the proceedings.
>
> B. Grounds for Intervention. Any person may intervene in any pending contested case hearing upon a showing that:
>
> (1) the movant will be aggrieved or adversely affected by the final order;
>
> (2) the interests of the movant are not being adequately represented by existing parties, or that it is otherwise entitled to intervene;
>
> (3) that intervention will not unduly prolong the proceedings or otherwise prejudice the rights of existing parties.
>
> C. Time for Motion for Intervention. The motion for leave to intervene shall be filed as early in the proceedings as possible to avoid adverse impact on the existing parties or the disposition of the proceedings. Unless otherwise ordered by the administrative law judge, the motion to intervene shall be filed at least twenty (20) days before the hearing. Any later motion shall contain a statement of good cause for the failure to intervene earlier.
>
> D. Conditions of Intervention. A person granted leave to intervene is a party to the proceeding. The intervenor shall be bound by any agreement, arrangement or other matter previously determined in the case. The order granting intervention may restrict the issues to be raised or otherwise condition the intervenor's participation in the proceeding. If appropriate, the administrative law judge may order consolidation of petitions and briefs and limit the number of representatives allowed to participate in the proceedings.

SCALC Rule 20.

One example of the judicial application of this definition of a "party" is found in the South Carolina Court of Appeals case *Home Health Services, Inc. v. S.C. Dep't of Health & Envtl. Control*, 298 S.C. 258, 379 S.E.2d 734 (1989). In that case, Home Health Services, Inc. ("HHS") participated as a witness, but never intervened as a party, in an administrative proceeding before the Department of Health and Environmental Control ("DHEC") that ultimately resulted in DHEC issuing a certificate of need to Roper Hospital. *Id.* at 260, 379 S.E.2d at 735. HHS immediately sought to challenge that issuance in the circuit court, but their case was dismissed under Rule 12(b)(1), SCRCP, on the grounds that HHS "never became a party to the administrative proceedings." *Id.* The Court of Appeals affirmed this dismissal, and noted that despite having notice and the opportunity to seek to intervene as a party to the administrative proceeding, HHS never actually sought intervention at the administrative level. *Id.* at 260-61, 379 S.E.2d at 735-36. The Court of Appeals in *Home Health Services* opined:

> By not seeking party status in the agency proceedings, as it properly could have done, Home Health Services removed itself from the APA's definition of the term "party."
>
> Because it was not a "party," as the term is defined by the APA, to the DHEC proceedings, Home Health Services, therefore, lacks standing under Section 1–23–380(a) to seek judicial review of DHEC's final decision regarding Roper's application.

Id. at 261, 379 S.E.2d at 736. Accordingly, we believe that a court faced with the question presented in your letter most likely would conclude that an aggrieved party should timely seek to intervene to become a named party to the case in order to pursue an appeal as described in your letter.

We do not see any legal reason why the presence or absence of legal counsel at the agency level would have any bearing on this conclusion, except that in practice the presence of legal counsel likely would help ensure that an aggrieved party's procedural rights are timely exercised by seeking to intervene. *See* SCALC Rule 20(C) ("Time for Motion for Intervention"); *see also Home Health Services, Inc. v. S.C. Dep't of Health & Envtl. Control*, 298 S.C. 258, 379 S.E.2d 734 (1989).

3. May the Commission ever be a party "aggrieved by a final decision" when that decision is rendered by a panel of the Commission?

We believe that a court most likely would conclude that the Commission standing as a party before a panel of the Commission operating as impartial decision-makers may be aggrieved by a final decision of the panel. Under the APA, personnel employed by a state agency who act as investigators or prosecutors in an administrative proceeding may appear before a panel of other persons, also employed by the same agency, who adjudicate the proceeding. *See, e.g., Babcock Center, Inc. v. Office of Audits*, 286 S.C. 398, 334 S.E.2d 112 (1985). Agencies which utilize this practice must take care that the same persons act as prosecutor and judge in a case in violation of S.C. Const. art I, § 22, which reads in relevant part: "[n]o person [shall] be subject to the same person for both prosecution and adjudication." However, the South Carolina Supreme Court has held that this practice satisfies the requirements of the due process and Article I, § 22 of the South Carolina Constitution where none of the persons involved in the investigation or prosecution also sit on the adjudicatory panel:

> We hold that the word "person" in the Constitutional language, "nor shall he be subject to the same person for both prosecution and adjudication", does not preclude, as a due process violation, an administrative agency from adjudicating appeals by panels composed of other persons within the same agency who did not participate in investigative or prosecutorial capacities.

Id. at 402, 334 S.E.2d at 114, *see also Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.E.2d 712 (1975) (discussing federal constitutional due process requirements in an administrative proceedings). Conversely, our state's Supreme Court also has held that a state agency administrative proceeding violates S.C. Const. art I, § 22 where agency members involved in the investigatory phase of a proceeding also sat on the panel that adjudicated the proceeding. *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 333 S.C. 432, 511 S.E.2d 48 (1998).

The appellate courts of this state have affirmed the propriety of an administrative agency acting as a party to an appeal from an agency proceeding. *See Dorman v. Dep't of Health & Envtl. Control*, 350 S.C. 159, 565 S.E.2d 119 (Ct. App. 2002). In *Dorman v. Department of Health and Environmental Control*, the South Carolina Court of Appeals considered a case where the Bureau of Ocean and Coastal Resource Management ("OCRM"), a state office governed by the Coastal Zone Management Appellate Panel, granted a necessary permit to build a boat dock. *Id.* at 162-63 & fn.1, 565 S.E.2d at 121 & fn.1. Neighbors who opposed the proposed dock sought a contested case, and the Administrative Law Judge reversed the grant. *Id.* at 163, 565 S.E.2d at 121. Thereafter, the case was appealed to the Coastal Zone Management Appellate Panel (the Panel) of the OCRM, and the Panel reinstated the grant. *Id.* When the case reached the South Carolina Court of Appeals, those opposing the permit argued that "because OCRM did not appeal the ALJ's order, it should not have been permitted to argue the agency's viewpoint or interpretation of its regulations before the Panel or the circuit court on appeal." *Id.* at 169, 565 S.E.2d at 125. The Court of Appeals rejected this argument, and opined:

> While OCRM did not appeal the ALJ's order, the agency remains a party at all levels to represent the agency and its policy stance. While we do not hold that the OCRM staff is a necessary party on appeal, we find it clearly is a proper party. In *Owen Steel*, this court held that the agency was not a necessary party to the appeal and was not required to be made a party on appeal by statute. *Owen Steel Co. v. S.C. Tax Comm'n*, 281 S.C. 80, 84–85, 313 S.E.2d 636, 639 (Ct. App. 1984). "In considering whether there is a defect of parties, the distinction between necessary and proper parties is crucial." *Id.* However, the agency may be a proper party on appeal, and the APA requires an appellant to serve the agency with a copy of the petition for review to ensure it has notice of any proceeding. *Id.* at 85–86, 313 S.E.2d at 638. Upon notice, the agency may petition to be made a party to the appeal. "Except in unusual circumstances, we anticipate that such a motion would be granted as a matter of course." *Id.*

Id. at 169-170, 565 S.E.2d at 125. In summary, reported cases of the South Carolina Supreme Court and the South Carolina Court of Appeals affirm that a state agency may participate as a party in an agency-level proceeding within the bounds of due process and the South Carolina Constitution, and a state agency may also participate as a party to an appeal from such a proceeding. *Id.; Babcock Center, Inc. v. Office of Audits*, 286 S.C. 398, 334 S.E.2d 112 (1985).

Turning to the question presented in your letter, we understand that that the Commission typically prosecutes cases before a panel composed of Commission members who were not involved in the investigation of the case. *See question presented.* The General Assembly has codified several statutory provisions with the apparent intent to ensure the impartiality and independence of the panel hearing the case. *See, e.g.*, S.C. Code Ann. § 1-13-90(c)(11) ("no member of the Commission shall be a member of a panel to hear a complaint for which he has been a supervisory commission member") & § 1-13-90(c)(12) ("endeavors at conciliation [i.e. settlement negotiations] by the investigator shall not be received into evidence nor otherwise made known to the members of the panel"); *cf.* S.C. Code Ann. § 31-21-130(H). These provisions likely are also intended to satisfy the requirement in Article I, § 22 of the South Carolina Constitution that "[n]o person [shall] be subject to the same person for both prosecution and adjudication." S.C. Const. art I, § 22; *see also Garris v. Governing Bd. of S.C. Reinsurance Facility*, 333 S.C. 432, 511 S.E.2d 48 (1998).

Presumably a truly impartial panel will render decisions adverse to an aggrieved party where the Commission panel believes such a decision is proper on the merits, even when a Commission attorney has presented the case. Where Commission attorney prepares a case and presents it on behalf of the Commission as a named party while also representing the interests of an aggrieved party and the public interest, the Legislature cannot have intended that the Commission could not be aggrieved by, and have the right to appeal from, a hypothetical error of law made by the Commission panel – an error which also is likely to be adverse to the aggrieved party and public interest. *See State ex rel. McLeod v. Montgomery*, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964) ("[I]f possible, [courts] will construe [a] statute so as to escape [a plainly absurd result] and carry the intention into effect"). Instead, the most coherent reading of the code sections set out in your letter is that an attorney representing the Commission as a named party to appeal the case in the name of the Commission. *Cf. Dorman v. Dep't of Health & Envtl. Control*, 350 S.C. 159, 565 S.E.2d 119 (Ct. App. 2002). We believe that a court would conclude that this more coherent reading is faithful both to the text of the code sections at issue and to the state purposes of the General Assembly in enacting these laws. *See id.*

4. (A) Where the language of § 31-21-130(C) and (H) is imperative regarding the agency's duty to bring and prosecute a claim on behalf of an aggrieved party, (O) uses permissive language in regards to the pursuit of an appeal. Is the agency under any obligation to pursue an appeal where it appears one of the factors outlined in § 1-23-380 are implicated?

(B) Where the language of § 1-13-90 (C) (5) and (12) is imperative regarding the agency's duty to bring and prosecute a claim on behalf of a complaining party, (19) uses permissive language in regards to the pursuit of an appeal. Is the agency under any obligation to pursue an appeal where it appears one of the factors outlined in § 1-23-380 are implicated?

We believe that a court most likely would conclude that the Commission may exercise its discretion not to pursue an appeal where the applicable statutes contain permissive language regarding pursuit of such an appeal.

Based on our follow-up telephone conversations with you, we understand that "the factors outlined in § 1-23-380" referred to in your question are the factors set out in Section 1-23-380(5), which reads in relevant part:

> The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
>
> (b) in excess of the statutory authority of the agency;
>
> (c) made upon unlawful procedure;
>
> (d) affected by other error of law;
>
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5) (Supp. 2017). Turning to the substance of your question regarding mandatory and permissive language, we note that Section 31-21-130(C)(1) reads:

> If the order is for a hearing, the commissioner shall attach to it a notice and a copy of the complaint and require the respondent to answer the complaint at a hearing at a time and place specified in the notice and shall serve upon the respondent a copy of the order, the complaint, and the notice.

S.C. Code Ann. § 31-21-130(C) (emphasis added). Conversely, Section 31-21-130(O) provides in relevant part that "[e]ither party to the dispute . . . may appeal from the decision of the commission to the Administrative Law Court as provided in Sections 1-23-380(B) and 1-23-600(D)." S.C. Code Ann. § 31-21-130(O) (emphasis added).

Similarly, Section 1-23-380(C) reads in relevant part:

> (5) If not sooner resolved, the investigator shall upon completion of his investigation submit to the supervisory commission member a statement of the facts disclosed by his investigation and recommend either that the complaint be dismissed or that a panel of commission members be designated to hear the complaint. The supervisory commission member, after review of the case file and

> the statement and recommendation of the investigator shall issue an order either of dismissal or for a hearing, which order shall not be subject to judicial or other further review.
>
> . . .
>
> (12) At any hearing held pursuant to this subsection, the case in support of the complaint shall be presented before the panel by one or more of the commission's employees or agents, and, with consent of the panel, by legal representatives of the complaining party; provided, that endeavors at conciliation by the investigator shall not be received into evidence nor otherwise made known to the members of the panel.

S.C. Code Ann. § 1-13-90(C)(5)&(12). Conversely, Section 1-13-90(C)(19) provides in relevant part: "[e]ither party to the dispute . . . may appeal the decision of the commission to the Administrative Law Court as provided in Sections 1-23-380(B) and 1-23-600(D)." S.C. Code Ann. § 1-13-90(C)(19) (emphasis added).

As discussed more fully earlier in this opinion,

> The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S., E.2d 203 (Ct. App. 2002) (citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory interpretation are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999).

Op. S.C. Att'y Gen., 2005 WL 1983358 (July 14, 2005). In the each of the code sections quoted above, the General Assembly included both mandatory language ("shall") and permissive language ("may") regarding different duties of the Commission within the same respective code sections. *See* S.C. Code Ann. § 31-21-130(C) & (O); *see also* S.C. Code Ann. § 1-13-90(C)(5) & (19). When the General Assembly uses the term "shall" elsewhere in the statute but the uses the term "may" to preface the power to pursue an appeal, the plain reading of these sections conveys a legislative intent that the Commission as a party to the proceeding would have the option of appealing an adverse decision if appropriate but it is not required to do so. *See id.* Therefore, we believe that a court would conclude that that the Commission may exercise its discretion not to pursue such an appeal. *See, e.g., Op. S.C. Att'y Gen.*, 1996 WL 755786 (November 13, 1996) ("Use of such permissive language thus makes it clear that the Legislature wished to permit, but not necessarily require [a specified outcome]."). We note that there may be instances where public policy and the stated mission of the Commission weigh strongly in favor of pursuing an appeal of a particular case, but ultimately the General Assembly has given the Commission discretion in how they fulfill that mission in pursuing appeals. *See id; see also* S.C. Code Ann. § 31-21-130(C) & (O); see also S.C. Code Ann. § 1-13-90(C)(5) & (19).

Please note that this conclusion is intended to answer only the question of whether the Commission may exercise its discretion in deciding whether to use its limited resources derived from the taxpayer to pursue an appeal. Numerous other opinions of this Office have discussed the use of mandatory and permissive language in statutes, and this opinion should be understood in the conjunction with those opinions and in the context of this particular statutory language and the question presented. *Cf., e.g., Op. S.C. Att'y Gen.*, 1981 WL 96604 (September 17, 1981) ("[I]t is also recognized that the words 'may', 'shall' and 'must' are frequently used interchangeably in statutes without regard to their literal meaning. Therefore, the word 'shall' may be construed as merely permissive, where the language of the statute as a whole, and its nature and object indicate that such was the legislative intent . . . .").

Conclusion:

In conclusion, for the reasons set forth above, it is the opinion of this Office that a court faced with the questions presented in your letter most likely would conclude that:

1. Where an agency attorney is representing the interests of an aggrieved party in a proceeding before an agency panel, that attorney may request an application for review or appeal from a decision of that panel;

2. Where a complainant or aggrieved party is not a named party to an action but wishes to seek review or pursue an appeal of a decision of the panel, the appropriate course of action is for that complainant or aggrieved party to timely seek to intervene in the action to become a party and then pursue the appeal under the procedure set out in the APA. The presence or absence of legal counsel at the agency level would not have any bearing on this conclusion;

3. The Commission standing in the position of a party before a panel of the Commission operating as impartial decision-makers may be aggrieved by a final decision of the panel; and

4. The Commission may exercise its discretion not to pursue an appeal where the applicable statutes contain permissive language regarding pursuit of such an appeal.

Sincerely,

David S. Jones
Assistant Attorney General

Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General

Appendix B

South Carolina Bar

ETHICS ADVISORY OPINION

18-03

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY.

South Carolina Rules of Professional Conduct: 1.2, 1.4, 2.1, 3.5

Factual Background:

Inquirer is one of three attorneys employed by a state administrative agency ("the Agency"). The Agency's duties include enforcement of antidiscrimination laws in two distinct subject areas, and Inquirer has posed questions regarding the possible existence of ethical conflicts under the applicable statutory enforcement mechanisms. Both statutory enforcement mechanisms operate in essentially the same way, and may be summarized as follows:

1. A person who claims to have been injured by a prohibited discriminatory practice submits a written complaint to the Agency.
2. An Agency employee is assigned to investigate the matter. One set of statutes, but not the other, provides that a voting member of the Agency shall be designated to supervise the investigation.
3. Upon completion of the investigation, the investigator submits (to the supervising Agency member or to the Agency head, depending on the applicable set of statutes) a statement of facts revealed by the investigation and recommends either that the complaint be dismissed or that a panel of Agency members be assigned to hear the complaint.
4. The supervising Agency member or the Agency head shall review the investigator's report and recommendation and issue an order of dismissal or for a hearing.
5. If the matter is not dismissed, the complainant will receive information regarding further proceedings. The complainant also receives a letter intended to notify the complainant that there is no attorney-client relationship between the complainant and Agency attorneys, who "represent [Agency], the state, and the public's

interests." The letter further advises, "[W]hile your interests and the interests of the State of South Carolina are expected to be the same, the possibility does exist that at some point our respective interests may differ and you will have the right to retain your own attorney and to intervene in the case."

6. At any time before the hearing, the Agency may amend the complaint upon the request of the investigator, the complainant, or the respondent.

7. A panel of three agency members will be assigned to hear the matter. At the hearing:

   a) The case in support of the complaint will be presented by one or more Agency employees, and/or by a legal representative of the complainant; and

   b) The complainant is entitled to attend and submit evidence.

8. If the panel determines that the respondent has engaged in a prohibited discriminatory practice, it must state its findings and issue, in the name of the Agency, an opinion and order providing for appropriate relief.

9. If the panel determines that the respondent has not engaged in a discriminatory practice, it must state its findings and issue an order dismissing the complaint.

10. If an application for review is filed within 14 days of the panel's order, the Agency, for good cause, shall review the order and the evidence, receive additional evidence, rehear the parties or their representatives, and decide whether to amend the order.

11. Thereafter, either party to the dispute may appeal the Agency's order to the Administrative Law Court. Appeals are governed by the Administrative Procedures Act, S.C. Code Ann. §§ 1-23-380(B), 1-23-600(D).

As noted above, Inquirer is one of three attorneys employed by the Agency. For each complaint filed with the Agency, one of the attorneys is designated to serve as the Prosecuting Attorney. Although the investigator may have incidental contact with any of the attorneys, the Prosecuting Attorney answers legal questions from the investigator and reviews the investigator's report and recommendation before it is submitted to the supervising Agency member or the Agency head. In the event of a hearing before a panel of the Agency, the Prosecuting Attorney presents the case in support of the complaint. One of the other two attorneys will act as Advice Counsel to the panel. Advice Counsel—who has limited or no knowledge of the case being presented and does not participate in the panel's adjudications—assists the panel with evidentiary matters, clarification of points of law, and the form of the panel's order.

Questions:

1. Questions Regarding the Role of Advice Counsel

May an Agency attorney, who has not been designated as the Prosecuting Attorney for a particular matter, serve as Advice Counsel under any or all of the following circumstances:

A. The attorney has had no contact with an investigator concerning the matter;

B. The attorney has had contact with the investigator regarding non-substantive matters, such as answering a general legal question or assisting with issuance of a subpoena;

C. The attorney has had contact with the investigator regarding substantive matters, such as the legality of the conduct complained of or review of the investigator's report and recommendation.

2. Questions Regarding the Role of Prosecuting Attorney

A. May the Prosecuting Attorney request reconsideration of the panel's order on the basis of:

(1) concern that the order contains an error of fact or law adverse to the complainant, but not adverse to the public interest?

(2) concern that the order contains an error of fact or law adverse to the public interest, but not adverse to the complainant?

B. May the Prosecuting Attorney appeal the panel's order on the basis of:

(1) concern that the order contains an error of fact or law adverse to the complainant, but not adverse to the public interest?

(2) concern that the order contains an error of fact or law adverse to the public interest, but not adverse to the complainant?

C. What are the Prosecuting Attorney's obligations in the following circumstances:

(1) The complainant requests an appeal but the Agency head directs the Prosecuting Attorney not to appeal;

(2) The Agency head directs the Prosecuting Attorney to appeal, but the complainant opposes an appeal.

Summary:

In large part, the questions posed by the Inquirer involve legal issues that are beyond the Committee's purview. Addressing only those aspects of the Inquiry that potentially raise concerns under the South Carolina Rules of Professional Conduct, the Committee's opinion is as follows:

Question 1: An attorney who has been involved in substantive matters during the investigative phase of a complaint should not act as Advice Counsel during the adjudicatory phase. Acting in such a dual capacity raises the specter of undue influence on the Agency's decision-making process, regardless of the care taken by the attorney to avoid any actual impropriety.

Question 2: The decision to seek reconsideration of, or to appeal, the panel's order is one for the Agency head, as the client. The Prosecuting Attorney must communicate and

consult with the Agency head on whether to seek reconsideration or to appeal. In doing so, the Prosecuting Attorney should render candid advice regarding not only the law but also other relevant considerations, which may include the views of the complainant.

Discussion:

Question One:

Advice Counsel's involvement in substantive aspects of the investigation primarily presents issues of due process that are beyond the scope of this Committee's authority to address. *See* S.C. Const. Art. I, § 22; *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 333 S.C. 432 (1998). Aside from the potential legal ramifications, acting as Advice Counsel following substantive involvement in the investigation of a complaint may implicate Rule 3.5 (Impartiality and Decorum of the Tribunal). More specifically, involvement in substantive aspects of the investigation creates the possibility that Advice Counsel's guidance to the panel will be explicitly or implicitly informed by direct knowledge of the facts, which may differ from the evidence presented by the Prosecuting Attorney. Thus, the circumstances described in Question 1(C) are fraught with the potential for influencing the tribunal in violation of Rule 3.5(a). The circumstances presented in Questions 1(A) and 1(B), in contrast, do not implicate Rule 3.5 because neither scenario contemplates Advice Counsel having independent knowledge of the facts of the matter.

Question Two:

At first blush, the concerns raised by the various scenarios in Question Two appear to rest on the premise that the Prosecuting Attorney represents not just the Agency, but also the complainant. Whether an attorney-client relationship with the complainant is created by either or both of the statutory enforcement mechanisms described above is a legal question beyond the purview of this Committee. It is, however, within the scope of the Committee's authority to address the ethical issues that may arise when there is disagreement between the Prosecuting Attorney and his or her client, the Agency (acting through the Agency head), as to the means to be used in accomplishing the Agency's objectives in enforcing antidiscrimination laws.

Such issues are governed primarily by Rule 1.2, which addresses the allocation of authority between the client and lawyer. Rule 1.2(a) requires an attorney to abide by the client's decisions concerning the objectives of the representation and notes that Rule 1.4 imposes on the lawyer a duty to consult with the client as to the means for reaching those objectives. Comment [2] addresses the possibility that lawyer and client may disagree about what means should be used to accomplish the client's objectives. Of particular relevance to this Inquiry, Comment [2] notes that "lawyers usually defer to the client regarding such questions as the expense to be incurred and *concern for third persons who might be adversely affected.*" Rule 1.2, Cmt. 2 (emphasis added).

The obligation to defer to the client's decision regarding the objectives of the representation does not require a lawyer to keep mum about the pros and cons of a contemplated course of action. To the contrary, Rule 2.1 requires the lawyer to provide candid advice based on the lawyer's independent professional judgment. Echoing the commentary to Rule 1.2, Rule 2.1 comment [2] recognizes that "[a]dvice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as costs or effects on other people, are predominant."

In view of these principles, the answer to all of the issues posed in Question Two is essentially the same: under Rule 1.2(a), the Prosecuting Attorney must abide by the Agency's decision regarding whether to seek reconsideration or appeal in any given case. At the same time, Rule 2.1 requires the Prosecuting Attorney to provide candid advice to the Agency based on the Prosecuting Attorney's independent professional judgment. Depending on the circumstances, candid advice under Rule 2.1 may include an assessment of the public interest or information regarding the complainant's views.

Appendix C

AFTER ACTION ASSESSMENT (AAA)

ACTION: COMPLETION OF THE 2017-2018 EEOC CONTRACT

1. IDENTIFY THREE (3) THINGS THAT WENT WELL DURING THIS PERIOD

A.

B.

C.

2. IDENTIFY THREE (3) THINGS THAT WOULD ASSIST YOU IN CASE PRODUCTION

A.

B.

C.

Brief Summary of After Action Summary of the 2017-2018 EEO Contract by Supervisors
Note: 10 People participated

A) What went well?
   1. Team Work from Investigators, Supervisors, Legal and Management (12 positive comments)
   2. Flex Hours are good (4 positive comments)
   3. Training by the EEOC (2 positive comments)

B) What would assist you in the future in terms of quality case production and assist you to do your work successfully?
   1. Consider different processes: 22 suggestions were named and Supervisors and EEO Coordinator are Reviewing to see if standards need to be changed.
   2. Hire an Administrative Assistant (6 comments were made)- Commissioner and Christina are addressing
   3. PIP is a negative work Tool (3 negative comments were made) – Commissioner firmly believes that we need to keep these standards and practice
   4. Pay Increase (4 comments were made to increase pay) This is already being addressed by the Incentive bonus plan and the Commissioner
   5. No Weathers Group (2 negative comments were made) Last one was in November
   6. Intake (2 negative comments were made) Alex is aware and working to improve

Summary of Process Suggestions from Investigator Assessment for 2017-18 EEO Contract

- Decrease the amount of calls and interview to CPs. Too much time making unnecessary calls.
- Too many different standards from too many people (supervisors, Vicki, Dan, Legal, Rene).
- Some supervisors need more training to assist investigators. Some supervisors provide more assistance and information to investigators than others. All investigators should know the same information and not have to depend on coworkers to learn their jobs.
- Small group training (one on one) like the new investigators.

- Cases already being tabbed
- Supervisors should keep tabs on the productivity of the investigators cases so when an investigator leaves, the next investigator is not burdened with picking up where they left off which could be a year or more ago. I received a case from Timmie that hadn't been touched in over six months, upon contacting the CP I was notified by CP they thought the case was closed because it had been so long, which affected my personal case productivity and the agency's customer service.
- An instant messaging system on the computer would help investigators retrieve their answers quickly and help with developing more quality questions for RFIs.
- Streamline administrative processes performed by Investigators.
- Continue supervisor support in getting cases reviewed/turn-a-round faster

- Self-identification and understanding of specific areas where improvements can be made (i.e. getting RFI's prepared and out more timely). Subsequently, making necessary adaptations in practice utilizing inputs/suggestions from others.
- Continue in service trainings as they are scheduled and related to program area.
- Time - Continue experience gained through time (not to be misconstrued to mean 'a long long time') Enough to where noticeable improvement in proficiency and efficiency in all areas/duties as an employment investigator are better realized.

- Receive cases with position statements already in them. (Having to request position statements, sending 30 day letters, finding the correct address for Respondents or even finding the correct Respondent to request the position statement puts investigators in the hole minimum 1 month). Its possible investigators can be put in the hole 3 months before even reaching the correct Respondent. Ex. 30 day ltr, subpoena request for position statement (another 30 days) business acquired by new owner or incorrect person listed as Respondent (another 30 day ltr) to receive the position statement. While this may not be the case for most cases, it is a possibility it can happen and this is unfair to investigators to have to start 30, 60, 90 days in the hole.

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- Intake does 30-day formal requests (certified) for Position Statements
- Investigators assigned cases after receipt of Position Statements – will cut down on their 180-days
- Legal assist in writing analysis for Supervisors
- A Business Writing Essentials Class for Investigators
- If possible, complete contract numbers by 31 August 2019 so that September can be used for refreshers and trainings.

- Continuation of Legal writing the analysis for supervisors and cause cases for Investigators.
- Assign someone else to do the contact letters for investigators and only assign cases to investigators with the position statement already in the file.

- Time frames between getting case returned for additional information